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Supreme Court of the United States

October Term, ~~1948~~ 1949
No. ~~527~~ 19

TODD C. FAULKNER,

Petitioner,

vs.

JOHN T. GIBBS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF AP-
PEALS FOR THE NINTH CIRCUIT AND
BRIEF IN SUPPORT THEREOF.

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ROBERT W. FULWIDER,

Of Counsel.

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**PETITION FOR WRIT OF CERTIORARI TO
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PEALS FOR THE NINTH CIRCUIT.**

*To the Honorable the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Your Petitioner, Todd C. Faulkner, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the Decree of that Court holding valid and infringed United States Letters Patent No. 1,906,260. Said Decree was entered October 8, 1948 [R. 547] and petition for a rehearing was denied November 23, 1948 [R. 548].

This Court has jurisdiction under Title 28, United States Code, Section 1254.]

A certified transcript of the record in the case including the proceedings in the Court of Appeals is furnished herewith in compliance with Rule 38 of the Rules of this Court.

Summary Statement of the Matter Involved.

This case was brought by Respondent against Petitioner for infringement of United States Patent No. 1,906,260 issued on May 21, ~~1933~~, to the Respondent for a competitive game. Prior to this suit the Petitioner had for some time been operating a competitive game in Long Beach, California, known as the "Fawn Game," said game being variously referred to in the record as the "old" or "original" Fawn game.

Subsequent to the bringing of said suit Petitioner modified his game by incorporating a time clock therewith so that the players no longer competed with each other as in Respondent's game, but played for a stipulated time controlled by the clock. Said modified game is referred to in the record as the "new" or "altered" Fawn game. Petitioner then filed a Counterclaim [R. 12, 13] praying for a declaratory judgment of non-infringement as to *both* Fawn games, and invalidity of the Gibbs patent.

At the trial, claims 3, 6, 7, 8, 9 and 10 were in issue, and the trial judge decreed [R. 42] that all of said claims had been infringed by the original Fawn game. However, the *new* Fawn game was decreed to infringe only claims 3, 9 and 10, *i. e.*, it did *not* infringe claims 6, 7 and 8. An appeal was taken and the supersedeas bond was ~~set at~~ \$15,000. The Decree of the trial court was affirmed by the Ninth Circuit Court of Appeals and this Petition seeks a review of said affirmance.

As to validity, the functional language of the claims raises a question of law.

The patent in suit [R. 295] is concerned with a competitive game comprising a plurality of electrically interconnected units, each of which has the general outward ap-

pearance of the well-known pinball machine. Each unit is operated by a separate player who competes with players operating the other units [R. 539], the method of play being that of the well-known game called Bingo or Tango which was an outgrowth of the ancient game of Lotto.

Each game unit has a playing board with rows of holes therein and an annunciator backboard with an indicator light thereon for each of said holes. When a ball is rolled into any one of the holes on the playing board, a switch beneath the hole is closed and the corresponding indicator light on the annunciator panel is energized and remains energized during the balance of the play. Game units of this type were old in the prior art as shown in the patents to Nakashima [R. 375] and Hayashi [R. 383].

When a win is accomplished on any unit of the game a supplementary signal light on top of the annunciator panel of the winning unit is operated and all of the other game units are immediately de-energized to prevent further play thereon. A supplementary signal for indicating a win was shown in the Nakashima patent.

The assembly of a plurality of individually operated game units for competitive play and their interconnection in such a manner that a win on one unit immediately de-energized, *i. e.*, disconnected, all of the other units had long been standard practice in games of this type as shown by the patents to Chester [R. 423], Wallace [R. 435], Higuchi [R. 400] and others, and as admitted by Respondent on the witness stand [R. 147, 149-151].

Claim 3 of the patent in suit is a sub-combination claim directed to the construction and operation of one of the individual units of Respondent's game, while claims 6 to 10, inclusive, are directed to the entire game comprising

a plurality of said units interconnected so that a win on one unit will disconnect the rest.

The only possible novelty of claim 3 over said Nakashima patent [R. 375] resides in Respondent's particular method of energizing the indicator lights. This feature is described in the claim as

"means for energizing the said indicators as the associated contact devices (switches) are operated."

The only novelty in claims 6 to 10 over the Nakashima patent is expressed functionally as "means" for de-energizing or disconnecting the non-winning units when a win is made on one unit.

Petitioner in his Amended Answer, paragraph 6(b) [R. 11], specifically raised the issue of the failure of Respondent's claims to comply with R. S. 4888 on the ground that they

"do not particularly point out and distinctly claim the part, improvement or combination which the applicant therefor claims as his invention or discovery."

This defense was urged both at the trial and on the appeal, and while it was mentioned in the Appellate Court's decision, no discussion thereof was had in said Opinion. By its affirmance of the lower court's Decree the Court of Appeals held said claims to be sufficient under the statute.

As to infringement, the Decree of the Court of Appeals also raises a question of law.

Petitioner's original Fawn game, seen best in the photographs [R. 325-339], while different structurally was

similar to Respondent's game in result and method of play, and when a win was made on one unit, the other units were immediately disconnected. In the altered Fawn game, however, there is no de-energization or disconnection of the non-winners when a win is made. All units stay operable, no matter how many wins, until the time clock shuts them all down at once.

The trial court therefore decided [R. 287, 289] that the new Fawn game did not infringe claims 6, 7 and 8 since they called for a competitive game in which all non-winning units are immediately de-energized when one unit wins. No appeal was taken by Respondent from this decision.

However, claims 9 and 10, which also are limited in almost the same language as used in claim 6 to a competitive game in which the non-winning units are immediately disconnected, were held to be infringed by the new Fawn game.

The Findings of Fact do not give any basis for these inconsistent holdings of the trial court, and no amplification thereof appears in the Opinion of the Court of Appeals, which merely summarized without discussion the Findings of the lower court and the contentions of the parties.

Alternate Findings and Conclusions which would have removed these inconsistencies were proposed to the trial court [R. 20-33] but were refused.

Questions Presented.

The Decree of the Court of Appeals for the Ninth Circuit raises the following questions of law:

QUESTION 1. Is the doctrine of *Halliburton Oil Well Cementing Co. v. Walker, et al.*, 329 U. S. 1, 67 S. C. 6, 71 U. S. P. Q. 175, condemning the use of indefinite and functional language at the exact point of novelty in patent claims for a combination of mechanical and acoustical elements, applicable to claims for a combination of mechanical and electrical elements where the only feature of novelty in the claims is described broadly in terms of "means," or is said decision to be ignored as was done by the Court of Appeals in this case?

QUESTION 2. Where a court holds an accused apparatus not to infringe certain patent claims because said apparatus does not include an essential element of said claims, is it not contrary to fundamental law and logic for the court in the same decision to hold other claims of said patent which include the same essential element, infringed by said accused apparatus?

Reasons Relied Upon for the Allowance of the Writ of Certiorari.

The discretionary power of this Court is invoked upon the following grounds:

1. That the Court of Appeals for the Ninth Circuit in holding sufficient under R. S. 4888 the functional statements, "means for energizing" in claim 3, "means whereby, etc.," in claims 6, 7 and 8, and "means for discontinuing, etc.," in claims 9 and 10 of Patent No. 1,906,260, which statements define the only novelty in said claims, has rendered a decision in direct conflict with the decisions

of this Court in *Halliburton Oil Well Cementing Co. v. Walker, et al.*, 329 U. S. 1, 67 S. C. 6, and *General Electric Co. v. Wabash Appliance Corp.*, 304 U. S. 364, 58 S. C. 899.

2. That since claims 6, 7 and 8 of Patent 1,906,260 were held not infringed by Petitioner's new Fawn game because said new game omitted an essential element of said claims, the decision of the courts below that claims 9 and 10, which include the same essential element, were infringed by said new Fawn game, is so inconsistent on its face as to constitute such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

3. That issues of great moment to the public are involved and further litigation of Patent 1,906,260 which might result in conflict between Circuit Courts of Appeals is improbable because Respondent has dominated the field so thoroughly as to intimidate other operators.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

HAROLD W. MATTINGLY,

Attorney for Petitioner.

ROBERT W. FULWIDER,

Of Counsel.

State of California, County of Los Angeles—ss.

Harold W. Mattingly, being duly sworn, deposes and says:

That he is the attorney for the Petitioner herein, that he prepared the foregoing Petition and that the allegations thereof are true, as he verily believes.

HAROLD W. MATTINGLY.

Subscribed and sworn to before me this 28th day of January, 1949.

(Seal)

MARJORIE MCKAY,

Notary Public.

My commission expires July 15, 1949.

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinions of the Courts Below.

The Opinion of the Court of Appeals for the Ninth Circuit is reported at 170 F. 2d 34, 79 U. S. P. Q. 158, and appears in the record filed herewith [R. 538]. The Findings of Fact and Conclusions of Law of the District Court are in the record [R. 33-40]. The trial court's Opinion was delivered from the bench at the close of the trial and appears at pages 282-289 of the record. It was not reported. For a full understanding of the trial court's reasoning in the case it is necessary to also read pages R. 266-282 which cover the latter part of the general discussion between the Court and counsel preliminary to rendering the Opinion.

Jurisdiction.

The grounds for jurisdiction are:—

1. The Decree of the Court of Appeals was entered October 8, 1948 [R. 547]. Petition for rehearing was denied November 23, 1948 [R. 548].

2. The Decree was rendered in a suit in equity brought under the patent statutes to determine the issues of validity and infringement of Letters Patent issued by virtue of Revised Statute No. 4886 (35 U. S. C. 31).

3. The statute under which the jurisdiction of this Court is invoked is Title 28, United States Code, Section 1254.

4. The cases believed to sustain the jurisdiction are:

United Carbon Co. v. Binney & Smith Co., 317
U. S. 228, 87 L. Ed. 232;

Schriber-Schroth Co. v. Cleveland Trust Co., 311
U. S. 211, 217, 85 L. Ed. 132, 135;

*Mackay Radio & Telegraph Co. v. Radio Corp. of
America*, 306 U. S. 86, 89, 83 L. Ed. 506, 508;

*Halliburton Oil Well Cementing Co. v. Walker,
et al.*, 329 U. S. 1, 67 S. C. 6, 71 U. S. P. Q. 175.

Statement.

The facts are stated in the Petition.

Statutes.

The statutes under which this case arises which are necessary to be considered are as follows:

Revised Statute, Section 4886 (U. S. C., Title 35, sec. 31):

"Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof or more than one year prior to his application, and not in public use or on sale in this country for more than one year prior to his application, unless the same is proved to have

been abandoned, may, upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor."

Revised Statute, Section 4888 (U. S. C., Title 35, sec. 33):

"Before any inventor or discoverer shall receive a patent for his invention or discovery, he shall make application therefor, in writing, to the Commissioner of Patents, and shall file in the Patent Office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; and in case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery"

Specification of Errors.

The errors which Petitioner will urge if the writ of certiorari is allowed, are that the Court of Appeals for the Ninth Circuit erred:

1. In failing to reverse the Decree of the District Court holding the Gibbs Patent No. 1,906,260 valid and infringed by Petitioner;

2. In holding the Gibbs Patent No. 1,906,260 to be valid;

3. In holding the Gibbs Patent No. 1,906,260 to have been infringed by Petitioner;

4. In failing to hold that the law established by the decisions of this Court in *Halliburton Oil Well Cementing Company v. Walker, et al.*, 329 U. S. 1, 67 S. C. 6; 71 U. S. P. Q. 173, and *General Electric Company v. Wabash Appliance Company*, 304 U. S. 364, 58 S. C. 899, were controlling and dispositive of the litigation;

5. In holding that claims 3, 6, 7, 8, 9 and 10 of Gibbs Patent No. 1,906,260 define the alleged improvement thereof with sufficient distinctness and clarity to comply with Revised Statute 4888 which requires a patentee to "particularly point out and distinctly claim the part, improvement or combination which he claims as his invention or discovery."

Summary of Argument.

The points of the argument re-state the reasons relied upon for the allowance of the writ of certiorari (pp. 6-7; *supra*).

ARGUMENT.

POINT I.

The Court of Appeals for the Ninth Circuit in Holding Sufficient Under R. S. 4888 the Functional Statements, "Means for Energizing" in Claim 3, "Means Whereby, etc." in Claims 6, 7 and 8, and "Means for Discontinuing etc." in Claims 9 and 10 of Patent No. 1,906,260, Which Statements Define the Only Novelty in Said Claims, Has Rendered a Decision in Direct Conflict With the Decisions of This Court in *Halliburton Oil Well Cementing Co. v. Walker, et al.*, 329 U. S. 1, 67 S. C. 6; and *General Electric Co. v. Wabash Appliance Corp.*, 304 U. S. 364, 58 S. C. 899.

In the *General Electric v. Wabash* case, this Court speaking through Mr. Justice Reed said:

"The claim uses indeterminate adjectives which describe the function of the grains to the exclusion of any structural definition and thus falls within the condemnation of the doctrine that a patentee may not broaden his product claims by describing the product in terms of function. *Holland Furniture Co. v. Perkins Glue Co.*, 277 U. S. 245, 45 S. C. 474. * * * but the vice of a functional claim exists not only when a claim is wholly functional, if that is ever true, but also when the inventor is painstaking when he recites what has already been seen, and then uses conveniently functional language at the exact point of novelty."

The foregoing doctrine was re-affirmed and amplified in the *Halliburton v. Walker* case. The Walker patent was concerned with locating the fluid level in a well and included means for creating a pressure wave in the well

and a system for recording on a chart the time when the wave was initiated and the time when echoes returned from obstructions in the well. The novelty of the Walker patent resided in the addition of an adjustable pipe which functioned as an acoustical tuned-resonator so that better records could be made of echoes from tubing collars. This latter element which constituted the sole novelty in the Walker patent was described in the claims as

"means associated with said pressure responsive device for tuning said receiving means to the frequency of echoes from the tubing collars of said tubing sections to clearly distinguish the echoes from said couplings from each other."

In discussing the Walker claims, this Court speaking through Mr. Justice Black pointed out that:

"The language of the claim thus describes this most crucial element in the new combination in terms of what it will do rather than in terms of its own physical characteristics or its arrangement in the new combination apparatus."

The Court then went on to say:

"Patents on machines which join old and well known devices with the declared object of achieving new results, or patents which add an old element to improve a pre-existing combination, easily lend themselves to abuse. And to prevent extension of a patent's scope beyond what was actually invented, courts have viewed claimed combinations and improvements or additions to them with very close scrutiny.

"These principles were again emphasized in *Merrill v. Yeomans*, 94 U. S. 568, 570, where it was said

that in cases where the invention is a new combination of old devices he (the patentee) is bound to describe with particularity all these old devices and then the new mode of combining them for which he desires a patent. This view has most recently been reiterated in *General Electric Co. v. Wabash Electric Co.*, *supra*. Cogent reasons would have to be presented to persuade us to depart from this established doctrine. The facts of the case before us far from undermining our confidence in these earlier pronouncements, reinforce the conclusion that the statutory requirement for a clear description of claims applies to a combination of old devices."

It would be difficult to find claims more clearly on all fours with the claims in the *Halliburton* case than the claims of Respondent herein. In the Walker claims the only element of novelty was described as means for tuning the receiving means to the frequency of echoes from the tubing collars. In claim 3, for example, of Respondent's patent the only element of novelty is described as "means for energizing the indicators as the associated contact devices are operated." Since the language in the Walker claims does not comply with the statute, the quoted wording from Respondent's claim 3 likewise does not comply with the statute.

The only "means for energizing" disclosed in Respondent's patent is a series of electrical relays, one for each indicator lamp.

In the Fawn games, both old and new, the same result is accomplished mechanically.

Claims 6 to 10 are equally objectionable under the statute, since in each instance they like claim 3, use con-

veniently functional language at the exact point of novelty. By their broad functional wording they purport to cover all combinations of elements, known and unknown, which achieve the desired result.

As previously mentioned, the doctrine of *Halliburton v. Walker* was urged upon both the trial and Appellate Courts herein. While the trial court paid lip service to the case by stating [R. 287] that if claim 6 were interpreted as broadly as requested by Respondent at the trial it would be invalid under the Halliburton doctrine, the Court of Appeals completely ignored the case and the doctrine.

In the first part of its decision the Circuit Court [R. 539] referred to Petitioner's contention that the claims in suit were invalid

"for failure to comply with the provisions of 35 U. S. C. 33 in that . . . the claims do not particularly describe and distinctly claim as invention the part, improvement or combination claimed as invention but merely represent an attempt to patent a function or result"

but then sidestepped a consideration of this question by holding at R. 545 that "Questions of invention and patent validity are questions of fact."

Said Decree by the Court of Appeals was in direct conflict with the decisions of this Court in the *Halliburton v. Walker* and the *General Electric v. Wabash* cases.

POINT II.

Since Claims 6, 7 and 8 of Patent 1,906,260 Were Held Not Infringed by Petitioner's New Fawn Game Because Said New Game Omitted an Essential Element of Said Claims, the Decision of the Courts Below That Claims 9 and 10, Which Include the Same Essential Element, Were Infringed by Said New Fawn Game, Is so Inconsistent on Its Face as to Constitute Such a Departure From the Accepted and Usual Course of Judicial Proceedings as to Call for the Exercise of This Court's Power of Supervision.

The game of the patent in suit is competitive in that the various players play against each other until one player makes a winning combination on his game unit. As soon as a winning combination is made all of the other units are immediately de-energized to prevent further play.

In the new or altered Fawn game, there is no competition between players since a time clock operates the game for a specified time and no units are shut down until a switch is operated by the time clock. This essential difference between the altered Fawn game and the Respondent's game was the basis for the trial court finding that claims 6, 7 and 8 were not infringed. Illustrative of this fact is the statement by the trial court at R. 287 as follows:

"The result is that under the new Fawn game there can be any number of winners and it is possible that no one should win during that time, while under the Gibbs game only one player may win and there is always a winner because the game does not stop until one person has won.

I do not think that claim 6 is infringed (by the new Fawn game) and I think if you read

them the way counsel desires me to read them they would fall under the interdict of the recent decision of the Supreme Court in *Halliburton v. Walker*."

It is abundantly clear that the trial court found claims 6, 7 and 8 not to be infringed because they are limited to a competitive game where when one player wins, the other game units are automatically de-energized, whereas the new Fawn game is not a competitive game because the other game units are not de-energized when a win is made on one unit.

However, after holding claims 6, 7 and 8 *not* infringed by the new game, the trial court held that claims 9 and 10 *were* infringed.

A simple comparison of the last elements of claims 6 and 9 shows that they are each directed to a competitive game in which a win on one unit results in de-energizing or disconnecting all non-winning game units. This result is set forth in claim 6 as follows:

"means whereby when all of the indicators in any group of any of said units have been operated to complete a winning play the indicators on all of the units except the winning unit will be de-energized."

In claim 9 it is described as:

"means controlled by the closing of the signal circuit of the winning unit for discontinuing the signals and opening the circuit of the indicators of all of the other units."

Since claims 6, 7 and 8 were held not to be infringed by the new Fawn game because of the omission of the above-quoted element, it would seem obvious on the face of it that claim 9 likewise can not be infringed since it describes the same element in almost the same language.

It is submitted that the affirmance of these obvious inconsistencies by the Appellate Court constitutes such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

POINT III.

That issues of Great Moment to the Public Are Involved and Further Litigation of Patent 1,906,260 Which Might Result in Conflict Between Circuit Courts of Appeals Is Improbable Because Respondent Has Dominated the Field so Thoroughly as to Intimidate Other Operators.

Patent 1,906,260 having been held valid and infringed, rights of the public are involved in this litigation and in view of the proceedings below, require the action of this Court for the protection of those rights.

"The possession and assertion of patent rights are issues of great moment to the public."

Precision Instr. Mfg. Co. v. Automotive M. Mach.,
324 U. S. 806, 65 U. S. P. Q. 133.

"To sustain claims so indefinite as not to give the notice required by the statute would be in direct contravention of the public interest which Congress therein (R. S., Sec. 4888, 35 U. S. C. A., sec. 33) recognized and sought to protect."

United Carbon Co. v. Binney & Smith Co., 317 U. S. 228, 233, 87 L. Ed. 232, 235.

"To sustain the claims in question upon the established and admitted facts would require a plain disregard of the public interest sought to be safeguarded by the patent statutes, and so frequently present but so seldom adequately represented in patent litigation."

Muncie Gear Works v. Outboard M. & Mfg. Co.,
315 U. S. 759, 768, 86 L. Ed. 1171, 1178.

Where the validity and infringement of a patent are in doubt and where it is improbable that conflict between Circuit Courts of Appeals will occur, due to the fact that only the litigants are engaged in competition thereon, certiorari may be granted.

Mackay Radio & Telegraph Co. v. Radio Corp. of America, 306 U. S. 86, 89, 83 L. Ed. 506, 508.

Conclusion.

The decision of this Court in the case of *Halliburton Oil Well Cementing Co. v. Walker*, 329 U. S. 1, reaffirms a doctrine of long standing on the construction of patent claims. If this doctrine is not to be applied to certain types of claims, the limitations thereon should be applied uniformly. On the other hand, if the doctrine of the *Halliburton* case applies to claims for a combination of mechanical and electrical elements as well as to combinations of mechanical and acoustical elements, rights of the public as well as rights of your Petitioner have been seriously impaired by the decision of the Court of Appeals for the Ninth Circuit.

It is believed, therefore, that the questions of law involved are of great importance and should be determined by this Court.

Respectfully submitted,

HAROLD W. MATTINGLY,

Attorney for Petitioner.

ROBERT W. FULWIDER,

Of Counsel.